American International Assurance Co, Ltd v Nadarajan a/l Subramaniam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2987 OF 2010
AZIAH ALI, LIM YEE LAN AND MAH WENG KWAI JJCA
6 MAY 2013

Insurance — Accident insurance — Basis of contract clause — Whether insured breached warranty in proposal forms that answers given were true and formed basis of contract between parties — Whether insured's giving of wrong estimation of annual income material — Whether insurer entitled to repudiate claim — Whether weight of medical evidence showed insured died of stroke caused by hypertension and not because of accident

The respondent in this appeal was the nominee in three personal accident insurance policies ('the policies') an insured had purchased from the appellant for a total insured sum of RM430,000. In the proposal forms for the purchase of the policies the insured had stated his estimated annual income to be RM150,000. The insured died in his home about a year after purchasing the policies. The appellant repudiated the respondent's claim for payment under the policies on the ground the insured did not die as a result of an accident but of a stroke caused by hypertension. The policies did not cover loss by disease or illness. In his action against the appellant in the High Court the respondent pleaded that the insured died as a result of a fall in the toilet of his house and not from hypertension. There was, however, no eyewitness to the incident. At the trial, the appellant adduced evidence to show there was material non-disclosure or incorrect disclosure by the insured in his proposal forms in that his income was not about RM150,000 per year as claimed but only about RM50,000 per year and that the postmortem report and other medical evidence showed the insured did not die as a result of a fall. In finding for the respondent, the trial court held that the insured did die of a fall and not due to illness and that any discrepancy in the proposal form about the amount he actually earned should not be material as the policies were to cover against accidents and what was important was whether the insured was employed in a job where accidents were high risk. There was evidence during the trial that a physician's report tendered in evidence on the insured's cause of death had been tampered with to make references to 'a fall in the bathroom' when the original report only stated the cause of death as intracerebral haemorrhage.

Held, allowing the appeal with costs and setting aside the decision of the High Court:

(1) The insured was bound by the warranty in each of the three proposal

forms that the answers he gave were true and that the answers would form the basis of the contract between the insured and the appellant. It was not the court's function to inquire into the materiality of the answers. The answers to the questions in the proposal forms were deemed material as the truth of the answers had been made a condition of the policies (see para 14(o)).

(2) There was material non-disclosure or incorrect disclosure when the insured stated in the proposal forms that his estimated annual income was RM150,000 when in fact it was only RM50,000. The big difference in the estimated income was a material fact as it might have had a bearing on the true occupation of the insured and this in turn might have affected the appellant's decision on whether or not to accept the risk and consequently to determine the rates/premiums and terms to be applied in the policies it issued (see para 14(i)(q)).

(3) The court was satisfied that the promixate cause of death of the insured was consistent with a stroke, which was an illness, and not due to a fall. There was no external injury, bruises or haematoma noted on the body and the medical report stated that the bleeding in the brain was due to 'spontaneous rupture of small blood vessels probably caused by underlying hypertension'. The court was of the view the insured must have suffered the intracerebral haemorrhage before the fall. The court's finding was fortified by the fact that the words 'due to a fall' must have been inserted by person or persons unknown in the physician's statement after it had been signed thereby casting grave suspicion on the respondent's case (see para 15(g)).

(4) The trial judge's finding that the insured died as a result of a fall was against the weight of the evidence and had to be set aside in view of the strong medical evidence and the falsification of the answer to the cause-of-death question in the physician's statement (see para 15(h)).

[Bahasa Malaysia summary

Responden dalam rayuan ini adalah penama di dalam tiga polisi insurans kemalangan persendirian ('polisi-polisi') pengambil insurans telah membeli daripada perayu sejumlah yang diinsuranskan sebanyak RM430,000. Dalam borang-borang cadangan untuk pembelian polisi-polisi pengambil insurans telah menyatakan anggaran pendapatan tahunannya sebanyak RM150,000. Pengambil insurans meninggal dunia di rumahnya lebih kurang setahun selepas membeli polisi-polisi tersebut. Perayu membatalkan tuntutan responden untuk pembayaran di bawah polisi-polisi tersebut atas alasan pengambil insurans tidak mati akibat kemalangan tetapi akibat strok yang diakibatkan oleh tekanan darah tinggi. Polisi-polisi tidak melitupi kerugian untuk penyakit. Dalam tindakannya terhadap perayu di Mahkamah Tinggi responden memplid bahawa pengambil insurans meninggal dunia akibat

terjatuh di bilik air rumahnya dan bukan daripada tekanan darah tinggi. Walau bagaimanapun tidak ada saksi kepada kejadian tersebut. Di masa perbicaraan, perayu mengemukakan keterangan untuk menunjukkan tidak terdapat pendedahan material atau pendedahan yang tidak betul oleh pengambil insurans dalam borong-borang cadangannya di mana pendapatannya bukan RM150,000 setahun seperti yang dituntut tetapi hanya lebih kurang RM50,000 setahun dan bahawa laporan postmortem dan keterangan perubatan yang lain menunjukkan pengambil insurans tidak mati akibat terjatuh. Dalam memihak kepada responden, mahkamah perbicaraan memutuskan bahawa pengambil insurans memang meninggal dunia akibat jatuh dan bukan akibat penyakit dan bahawa apa-apa percanggahan di dalam borang cadangan mengenai jumlah yang sebenarnya diperolehinya tidak patut menjadi material memandangkan polisi-polisi adalah untuk melindungi terhadap kemalangan dan apa yang penting adalah sama ada pengambil insurans berkerja dalam pekerjaan di mana kemalangan adalah berisiko tinggi. Terdapat keterangan semasa perbicaraan bahawa laporan pakar perubatan yang ditender dalam keterangan atas sebab kematian pengambil insurans telah diubah untuk membuat rujukan kepada 'a fall in the bathroom' apabila laporan asal hanya menyatakan sebab kematian sebagai pendarahan intraserebum.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan keputusan Mahkamah Tinggi:

(1) Pengambil insurans terikat dengan waranti dalam setiap ketiga-tiga borang cadangan bahawa jawapan yang diberikannya adalah benar dan bahawa jawapan akan membentuk asas kontrak di antara pengambil insurans dan perayu. Bukan fungsi mahkamah untuk menyiasat kepentingan jawapan-jawapan. Jawapan-jawapan kepada soalan-soalan dalam borang-borang cadangan dianggap material memandangkan kebenaran jawapan-jawapan telah dibuat syarat polisi (lihat perenggan 14(o)).

(2) Tidak terdapat pendedahan material atau pendedahan tidak betul apabila pengambil insurans menyatakan di dalam borang-borang cadangan bahawa anggaran pendapatan tahunannya adalah RM150,000 tetapi pada hakikatnya hanya RM50,000. Perbezaan besar di dalam pendapatan yang dianggarkan adalah fakta material kerana ia mungkin memberi kesan ke atas pekerjaan sebenar pengambil insurans dan ini mungkin akan menjejaskan keputusan perayu ke atas sama ada atau tidak untuk menerima risiko dan akhirnya untuk menentukan kadar/premium dan terma-terma untuk diguna pakai di dalam polisi-polisi yang dikeluarkannya (lihat perenggan 14(i)(q)).

(3) Mahkamah berpuashati bahawa punca kematian pengambil insurans adalah konsisten dengan strok, yang mana adalah penyakit, dan bukan akibat terjatuh. Tidak terdapat kecederaan luaran, lebam atau

haematoma di atas badan dan laporan perubatan menyatakan bahawa pendarahan di dalam otak adalah akibat 'spontaneous rupture of small blood vessels probably caused by underlying hypertension'. Mahkamah berpendapat pengambil insurans harus mengalami pendarahan intraserebum sebelum terjatuh. Dapatan mahkamah diperkukuhkan dengan fakta bahawa perkataan-perkataan 'due to a fall' semestinya dimasukkan oleh orang yang tidak dikenali di dalam penyataan pakar perubatan selepas ia ditandatangani dengan itu melemparkan syak kuat ke atas kes responden (lihat perenggan 15(g)).

(4) Dapatan hakim perbicaraan bahawa pengambil insurans meninggal dunia akibat terjatuh bertentangan terhadap keterangan dan terpaksa diketepikan mengambil kira keterangan perubatan yang kukuh dan pemalsuan jawapan terhadap soalan-soalan sebab kematian di dalam penyataan pakar perubatan (lihat perenggan 15(h)).]

Notes

For a case on basis of contract clause, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 1.

Cases referred to

Amanah Raya Bhd (suing as administrator of estate of Devia Nathan S/O Savarimuthu, deceased) v Jerneh Insurance Bhd (formerly known as Jerneh Insurance Corp Sdn Bhd) [2005] 4 MLJ 1; [2005] 2 CLJ 393, CA (refd)

Azizah bte Abdullah v Arab-Malaysian Eagles Sdn Bhd [1996] 5 MLJ 569, HC (refd)

China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52, FC (refd)

Leong Luen Kiew & Anor v The New Zealand Insurance Co, Ltd [1939] 1 MLJ 173, HC (refd)

Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu [1992] 1 MLJ 249, SC (refd)

Regina Fur Company, Ltd v Bossom [1958] 2 Lloyd's Rep 425, CA (refd)

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Watts v Simmons (1924) Ll L Rep 87, 116, 177, KBD (refd)

Legislation referred to

Insurance Act 1996 ss 149(4), 150

Appeal from: Civil Suit No S9–22–04 of 2001 (High Court, Kuala Lumpur)

Andrew Khoo (Khoo & Sidhu) for the appellant.
Ram Karpal Singh (Karpal Singh & Co) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] On 25 May 1998 the late Tholan s/o Lyasamy ('the insured') signed two proposal forms (*rekod rayuan* pp 207 and 220) to purchase two Classic PA personal accident insurance policies and on 1 June 1998, the insured signed another proposal form (*rekod rayuan* p 232) to purchase a Comprehensive PA personal accident insurance policy from the respondent.

[2] The sum insured for accidental death in the three policies issued were RM50,000, RM200,000 and RM30,000 respectively. On 3 June 1999, the sum insured for the first and second policies were increased from RM50,000–RM100,000 and from RM200,000–RM300,000 respectively.

[3] In all three proposal forms, the insured had stated his estimated annual income to be RM150,000 and under the column 'Occupation' he had described himself as 'a self-employed Managing Proprietor of a business selling and buying oil palm bunches'.

[4] The insured passed away on 29 August 1999 at about 8.50am in his house.

[5] The respondent was named as the beneficiary in the third policy only.

[6] On 14 September 2000, the appellant declined the respondent's claim on the three policies on the ground that the cause of death of the deceased was intracerebral haemorrhage secondary to hypertension which was an illness whilst the purported personal accident policies only covered accidental death sustained as a result of 'bodily injury effected directly and independently of all other causes by accident'.

[7] By a writ of summons dated 2 January 2001 the respondent claimed that the insured had died as a result of an accident when he fell in the toilet of his house on 29 August 1999 and not that he died from hypertension. The respondent accordingly claimed for the sums insured totaling RM430,000 together with general damages, interest and costs.

THE HIGH COURT TRIAL

[8] At trial, three issues were agreed to be raised for the determination of the court namely whether:

(a) the respondent was the nominee in all the three policies;

(b) there was material non-disclosure by the insured; and

(c) the death of the insured was due to an accident or due to an illness.

[9] After a full trial the learned judge held that the respondent was a nominee of the insured in all the three policies, that there was no material non-disclosure by the insured in the three proposal forms and that the death of the insured was due to a fall in the toilet within the meaning of the terms of the insurance policies and was not due to illness. Judgment for the sum of RM430,000 together with interest at 8%pa on the judgment sum and costs of RM20,000 was accordingly entered for the respondent.

[10] The appellant being dissatisfied with the decision appealed against it.

THE APPEAL

[11] At the hearing of the appeal, counsel for the appellant informed the court that he was abandoning the issue of whether the appellant was the nominee in all the policies and that he would be submitting on the remaining two issues of whether there was material non-disclosure by the insured and whether the insured's demise was an accidental death or due to illness.

THE DECISION

[12] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondent and upon hearing counsel aforesaid the court allowed the appeal and set aside the order of the High Court.

[13] The respondent being dissatisfied with the decision now applies for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[14] First issue — whether there was material non-disclosure by the insured

(a) a quick read of the three proposal forms shows the answers given by the insured to be as follows:
In proposal form nos 1 and 2.

B. Details of Occupation

1 Occupation - Self employed (Managing Proprietor).

Exact duties - as above.

Nature of Business - selling and buying oil palm bunches.

2 What is your estimated annual income? RM150,000.

and in proposal form no 3

5. Occupation - Managing Proprietor.

Please state exact duties - Selling and buying oil palm bunches.

10. What is your estimated annual income -RM150,000.

(b) at trial, counsel for the appellant sought to prove that the insured's estimated annual income was nowhere near RM150,000 but was at a very much lesser sum. Lee Siew Choo ('DW2'), in her evidence-in-chief testified that investigations carried out by the appellant revealed that the insured was a general worker at the Sungai Samak Estate in Ulu Bernam earning a monthly salary of RM290. Reference was made to the letter dated 16 March 2001, an agreed document, received by the appellant from Golden Hope Plantations (Peninsular) Sdn Bhd which stated that the insured was employed as a general worker in Sungai Samak Estate with a last drawn salary of RM290 per month. The insured having been born on 20 November 1937 retired in 1992 when he reached 55 years of age;

(c) the respondent ('PW1') in his witness statement in answer to questions 31–33 said that the insured had worked in Sungai Samak Estate and that upon reaching 55 years of age the insured and PW1 started a business in buying and selling oil palm bunches in 1997 and that the joint profit was about RM100,000pa;

(d) going by the letter from Golden Hope Plantations the insured earned about RM3,480pa in 1992 and according to the evidence of PW1 the insured earned about RM50,000pa (on the basis of an equal partnership) in 1997. Pursuant to the three proposal forms dated in May/June 1998, the insured had declared that he was earning about RM150,000pa;

(e) now given the discrepancy in the estimated annual income of the insured, the important question to be determined by the court was whether the non-disclosure or rather the incorrect disclosure by the insured was material;

(f) in his grounds of judgment the learned judge held that the discrepancy as to the amount of income earned was not sufficient for the appellant to repudiate liability on this ground. The learned judge was of the view that as these were accident policies, it should not matter to the appellant whether the insured was earning about RM50,000 or RM150,000pa as what really mattered would be the nature of his employment that is, whether the insured was employed in a high risk job where accidents were extremely likely;

(g) this court is of the view that while there was no incorrect disclosure or misrepresentation of an actual fact when the insured described himself as

being 'self employed (Managing Proprietor) in the selling and buying of oil palm bunches', there was a material non-disclosure or incorrect disclosure when the insured stated in the proposal forms that his estimated annual income was RM150,000;

(h) pursuant to s 149(4) of the Insurance Act 1996 ('the Act') the insured is obliged to disclose in the proposal form all the facts which he knew or ought to have known fully and faithfully, otherwise the policy issued may be invalidated. Under s 150 of the Act, the insured must disclose to the appellant before the contract of insurance was entered into any matter which the insured knew would be relevant to the decision of the appellant on whether to accept the risk or not and the rates and terms to be applied or any matter a reasonable person in the circumstances could be expected to know to be relevant;

(i) in the instant case, the insured was not of utmost good faith (uberrimae fide) when he informed the appellant that he was earning an estimated annual income of RM150,000 when in fact, according to PW1, he was only earning an annual income of about RM50,000. The big difference in the estimated income of about RM100,000pa is a material fact as it may have a bearing on the true occupation of the insured and this in turn may affect the decision of the appellant on whether or not to accept the risk and consequently to determine the rates/premiums and terms to be applied in the policies issued by the appellant;

(j) the insured was bound by the warranty in each of the three proposal forms that the answers given were true and that the answers would form the basis of the contract between the insured and the appellant. In Part IV of the insurance policies, it was clearly stated that the proposal forms shall be the basis of the insurance policies;

(k) in *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52, the Federal Court held that when a proposal for an insurance policy contains such a warranty and the policy expressly states that the proposal form is to be the basis for the policy, the truth of the answers to the questions in the proposal form are deemed to be material. The court held that the truth of the answers to the questions had been made a condition of the contract of insurance and it was not open to the trial judge to consider the question of whether the answers to these questions were material or not;

(l) counsel for the respondent submitted that it was not in all cases of non-disclosure that an insurer could repudiate a policy. The non-disclosure had to be material and in support counsel relied on the Supreme Court case of *Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249. Counsel submitted that the learned judge was perfectly entitled to reject the appellant's contention on non-disclosure on the ground that the non-disclosure, even if it was true,

was not material as the same did not, in any way, affect the nature of the policies, which in this case, were accident policies;

(m) in the *Pacific & Orient* case His Lordship Gunn Chit Tuan SCJ (as he then was) delivering the judgment of the court held that the court did not consider as a matter of fact that it was material for the plaintiff to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned in an earlier question and that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts;

(n) counsel for the respondent further submitted that in light of *Pacific & Orient*, which was decided 20 years later, the principle in *China Insurance* was no longer applicable;

(o) we are of the view that firstly, the issue of whether there was a non-disclosure or incorrect disclosure or misrepresentation in an answer in the proposal form is a question of fact to be determined by the court and secondly, given the decision in *China Insurance*, it is not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer has been made a condition of the policy. It will be noted that *China Insurance* was not considered by the Supreme Court in *Pacific & Orient*. It will be further noted that in *Pacific & Orient* it was a finding of the court made on the facts of that case that the non-disclosure was not material. In any event, in *Pacific & Orient* the court was not concerned with the 'basis clause' when concluding that the non-disclosure was not material whereas in the present case, the 'basis clause' was applicable to the contract of insurance entered into between the insured and the appellant. Accordingly the ratio in *China Insurance* will still be applicable. In short, the court with respect cannot agree with counsel for the respondent that *Pacific & Orient* has set aside the decision in *China Insurance* and that what is only material is the nature of employment of the insured and not the amount of his annual income;

(p) it is observed that the learned trial judge did not consider the decision in *China Insurance* in his grounds of judgment although the same had been referred to by counsel for the appellant in his submission. If he had so considered perhaps he would have arrived at a different conclusion; and

(q) the court was satisfied that the appellant had in the circumstances discharged its burden of proving the allegation of non-disclosure or incorrect disclosure of a material fact in the proposal form (see *Azizah bte Abdullah v Arab-Malaysian Eagles Sdn Bhd* [1996] 5 MLJ 569).

[15] Second issue — whether the death of the insured was due to an accident or due to an illness

(a) the coverage of each of the three policies was for 'accidental death' and each of the policies contained an exception clause stating that the coverage shall not apply to loss caused directly or indirectly, wholly or partly, by a disease or sickness;

(b) it was the pleaded case of the respondent that the insured died as a result of a fall in the toilet of his house;

(c) in the *sijil kematian* and *permit menguburkan*, the cause of death was stated as 'Intra cerebral haemorrhage';

(d) it was not disputed by the parties that there was no eye witness to the insured's alleged fall in the toilet on 29 August 1999 at about 8.50am. In the absence of any direct evidence what was adduced in court by way of evidence for the respondent was that Muniandy s/o Palar ('PW3'), saw the insured lying on the floor when he arrived at the scene. Neither he nor the respondent, who was called as PW1, had any personel knowledge of whether the insured did sustain a fall which caused his death;

(e) the appellant called Dr Mohd Yassim bin Abd Rahman ('DW1'), the *Pengarah* of Hospital Teluk Intan to prove that the proximate cause of death of the insured was due to an illness. In his medical report dated 9 May 2000, a Part A document, DW1 stated that there were no external injury, bruises or haematoma noted on the body and that intracerebral haemorrhage or bleeding in the brain was due to 'the spontaneous rupture of smaller blood vessels probably caused by underlying hypertension';

(f) in the postmortem report dated 29 October 1999 which was signed by DW1, prepared from the records of Dr Hon Mun Cheng who had performed the postmortem, the cause of death was listed as 'intracerebral haemorrhage' only whereas in the appellant's physician's statement signed by DW1 on 22 October 1999 (exh D3) the primary cause of death was purportedly stated as 'intracerebral haemorrhage due to fall in the bathroom'. In his evidence-in-chief DW1 stated categorically that the words 'due to fall in the bathroom' were not in the physician's statement when he signed the same. Further, DW1 confirmed that the words 'History of fall in the bathroom. He was later unable to move or talk' were also not in the statement when he had signed it. When questioned by the learned judge, DW1 clearly stated that in this case the intracerebral haemorrhage must have occurred before the fall;

(g) on the evidence, the court is satisfied that the proximate cause of death was consistent with a stroke which is an illness and not due to a fall. PW3 had stated that the insured did not have any signs of external bleeding

which would explain any trauma suffered by the insured while DW1 maintained that only severe trauma to the head of the insured would have caused haemorrhage as opposed to a stroke prior to the fall. In such circumstances the court is of the view that the insured must have suffered the intracerebral haemorrhage before the fall. The court's finding is fortified by the fact that the words 'due to a fall' must have been inserted by a person or persons unknown in the physician's statement after it had been signed by DW1, thereby casting a grave suspicion on the evidence of the respondent's case. This finding was notwithstanding the finding of the learned trial judge that the insured had no history of hypertension in the months before his death;

(h) we are of the view that the finding by the learned trial judge that the insured died as a result of a fall was against the weight of the evidence. We are keenly aware that there was no direct evidence of a fall, only circumstantial and that the learned trial judge had made an inference therefrom. This court is very mindful that it should be slow to interfere with and reverse any finding of fact made by a trial court. The court is also mindful of the decision of the Federal Court in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 where it was said that 'an appellate court should not reverse a judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion'. However an appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong. In the instant case, the finding of the learned trial judge had to be set aside in view of the strong medical evidence of DW1 and the falsification of the answer to the cause of death question set out in the physician's statement; and

(i) it is trite law that the respondent as the beneficiary must show that the death of the insured was due to a risk insured by the policy. In other words, the onus was on the respondent in this case to show that the insured died as a result of an accident (a fall) and not as a result of any other cause (see *Leong Luen Kiew & Anor v The New Zealand Insurance Co, Ltd* [1939] 1 MLJ 173; *Regina Fur Company, Ltd v Bossom* [1958] 2 Lloyd's Rep 425; *Watts v Simmons* (1924) Ll L Rep 87, 116, 177 and *Amanah Raya Bhd v Jerneh Insurance Bhd* [2005] 4 MLJ 1; [2005] 2 CLJ 393).

[16] The finding of this court is that the respondent had failed to show that the insured had died as a result of an accident. In the result, the appeal was allowed with costs of RM10,000.

Appeal allowed with costs and decision of the High Court set aside.

Reported by Ashok Kumar